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Federal Jurisdiction In Multi-State Habeas Corpus Petitions - Word v. North Carolina

Notes and Comments

Federal Jurisdiction In Multi-State Habeas Corpus Petitions

Word v. North Carolina[1]

The federal writ of habeas corpus presently extends ". . . to a prisoner . . . in custody in violation of the Constitution or laws or treaties of the United States."[2] Where such a violation exists, the first question to be answered by a petitioner seeking the relief of the great writ is which federal court has jurisdiction. The answer lies in the interpretation of 28 U.S.C. § 2241(a) which provides that:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.[3]

In a much criticized[4] 1948 decision, the Supreme Court in *Ahrens v. Clark*[5] held that the phrase "within their respective jurisdictions" requires, as a jurisdictional prerequisite, that the detained person be within the territorial district of the court in which petition for habeas corpus is made. Citing no case purporting to overrule *Ahrens,* the Court of Appeals for the Fourth Circuit in *Word v. North Carolina*[6] nevertheless has recently held that a state prisoner presently in custody in one state may attack a conviction in another state which has lodged a detainer with his present keeper by bringing a habeas corpus action in the district court of the state which lodged the detainer.

Each of the three petitioners in *Word* were serving sentences imposed upon them by and in the State of Virginia at the time of their application for federal habeas corpus relief. In addition, each man had also been convicted of an offense in North Carolina and North Carolina had lodged detainers[7] with the Virginia prison authorities. All three alleged constitutional infirmities in their North Carolina convictions that, if proven, would have entitled them to relief. Two of the petitioners, Word and Matthews, brought their actions in the United States District Court for the Eastern District of Virginia and relief was denied. The third petitioner, Williams, sought relief in the United

1. 406 F.2d 352 (4th Cir. 1969).
2. 28 U.S.C. § 2241(c)(3) (1964).
3. 28 U.S.C. § 2241(a) (1964).
4. *E.g.,* Fairman, *Some New Problems of the Constitution Following the Flag,* 1 STAN. L. REV. 587, 631-43 (1949); 16 U. CHI. L. REV. 335 (1949).
5. 335 U.S. 188 (1948).
6. 406 F.2d 352 (4th Cir. 1969).
7. North Carolina has enacted the Interstate Agreement on Detainers, N.C. GEN. STAT. § 148-89 (Supp. 1967).

States District Court for the Eastern District of North Carolina and was also unsuccessful. On appeal the Court of Appeals for the Fourth Circuit, after upholding the propriety of challenging sentences *in futuro,*[8] affirmed the decision of the Virginia court and vacated that

8. The jurisdictional question faced by the *Word* court was precipitated by the Supreme Court's decision in Peyton v. Rowe, 391 U.S. 54 (1968). Prior to *Peyton,* challenges of sentences *in futuro,* as in the instant case, were not allowed on the ground that the writ was sought prematurely. Holiday v. Johnston, 313 U.S. 342, 349 (1941); McNally v. Hill, 293 U.S. 131 (1934); Holloway v. Looney, 207 F.2d 433, 434 (10th Cir.), *cert. denied,* 346 U.S. 912 (1953).

In a nation that so highly prized the liberal use of the Great Writ, the decision in *McNally* constricting the use of the writ on procedural grounds certainly seemed out of step with tradition, and was the subject of much criticism. *See, e.g.,* 1 VALPARAISO L. REV. 155, 177 (1966), in which one commentator argued:

> The most compelling reason for abandoning *McNally* is the plight in which it places multiple offenders. Those prisoners . . . may have to serve years in prison, restrained by convictions which courts may ultimately hold invalid. There is no way adequately to repay an individual for years wrongly spent in prison.

Erosion of the *McNally* doctrine began with *Ex parte* Hull, 312 U.S. 546 (1941), in which the Court permitted habeas corpus attack of a second conviction which had resulted in revocation of parole and re-incarceration under the first sentence, *but cf.* Heflin v. United States, 358 U.S. 415 (1959), and continued through Jones v. Cunningham, 371 U.S. 236 (1963), where it was held that a prisoner on parole was "in custody" requisite to a petition for habeas corpus.

Departure from *McNally* in the lower federal courts was led by the fourth circuit. In Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965), it was held that habeas corpus is available to a prisoner serving an uncontested sentence for the purpose of litigating the validity of future sentences where the future sentences affected present eligibility for parole. *See* Note, *The "Custody" Requirement for Habeas Corpus,* 26 MD. L. REV. 79 (1966); 46 B.U.L. REV. 269 (1966); 54 GEO. L.J. 1004 (1966). In discussing the progressive attitude of the fourth circuit one writer noted:

> The decision is clearly in line with today's enlightened views concerning rehabilitation of the social deviant. It would appear to be anomalous to provide a parole system under which a prisoner might be able to attain certain liberties and then to deny him access to this system because of an antiquated interpretation of the habeas corpus doctrine.

2 GA. L. REV. 116, 119–20 (1967).

Other commentators doubted that the court would ever reconsider the *McNally* doctrine. *See generally* Note, *Habeas Corpus and the Prematurity Rule,* 66 COLUM. L. REV. 1164, 1173 (1966); Note, *Habeas Corpus and Prematurity,* 52 CORNELL L.Q. 149, 156 (1966); Note, *Postconviction Remedies: The Need For Legislative Change,* 55 GEO. L.J. 851, 862 (1967); Note, *Habeas Corpus, Custody and Declaratory Judgment,* 53 VA. L. REV. 673, 676 (1967).

Martin was followed by several other liberal interpretations of "in custody" by the fourth circuit. Rowe v. Peyton, 383 F.2d 709 (4th Cir. 1967); Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967); Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966) (the court allowing petitioner to attack fully served sentences where advancement of the commencement date of subsequent sentences resulting from invalidation of those fully served would entitle him to immediate release). For an interesting discussion of these cases, *see* 28 MD. L. REV. 162 (1968).

The problems created by the custody requirement led one group to suggest that it be done away with entirely. The American Bar Association Advisory Committee on Sentencing and Review felt that:

> Elimination of the custody condition would permit persons convicted to challenge sentences of imprisonment already completed, prison sentences concurrent to other unchallenged sentences, or sentences of fine, probation, or suspended sentences. Frequently this is made necessary by the application of multiple offender laws which upgrade the authorized or prescribed sentence for a present offense on the strength of the defendant's prior record. Parole consideration is likely to be influenced by the number of previous or concurrent convictions. Civil disabilities of more or less impingement frequently continue after a sentence has been completed. The proposal here made is merely that the availability of post-conviction review of the validity of criminal judgments should not turn upon present custody. This will not increase the volume of foreseeable litigation since the Advisory Committee also recommends a concomitant principle for state claims, the applicant must have a present need for the requested relief. Simple expunge-

of the North Carolina court, remanding Williams' case to the North Carolina Supreme Court,[9] characterizing the district court of the demanding state as the "proper" court in which to seek relief and the

ment of an old judgment that has no present or potential disadvantageous consequences is probably not a sufficient basis on which to burden the courts.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, comment to § 2.3 at 43-44 (Tent. Draft 1967).

In *Peyton,* neither of the petitioners would have had any restraints placed upon their liberty had the court refused to consider their challenges of their future sentences. Nevertheless, the court granted them habeas corpus hearings, reasoning that if the petitioners were forced to wait until the sentences to be challenged were commenced, the participants in such a hearing might become unavailable or deceased. Thus, the petitioners might lose the means by which to substantiate their claims. The decision further pointed out that the State also stood to lose by such a delay. If retrials were held to be necessary, the greater the lapse of time, the more unlikely it would become that the State could reprosecute. As one notewriter stated, "The *Rowe* decision provides a means whereby both the prosecution and the defense can equip the court with the most accurate and complete information upon which a just determination of the issues presented can be made." 2 GA. L. REV. 116, 119 (1967).

It is interesting to note that the Maryland Court of Appeals, prior to *Peyton v. Rowe,* permitted attacks on sentences not yet being served, in accord with the Maryland Post-Conviction Procedure Act. MD. ANN. CODE art. 27, § 645(a) (1965). *E.g.,* Simon v. Director, 235 Md. 626, 201 A.2d 371 (1964); Robert v. Warden, 221 Md. 576, 155 A.2d 891 (1959). *See generally* Comment, *Federal Habeas Corpus and Maryland Post-Conviction Remedies,* 24 MD. L. REV. 46 (1964); Comment, *The Maryland Version of the Uniform Post-Conviction Procedure Act, with Special Reference to the Writ of Habeas Corpus,* 19 MD. L. REV. 233 (1959).

It is certainly true that a retrogression to the *McNally* prematurity doctrine would have had a most detrimental effect on the quest for justice made by the petitioners in *Word.* The fourth circuit carefully points out these problems:

> If Williams must wait the ten or fifteen years remaining before Virginia delivers him to North Carolina for service of the North Carolina sentence, witnesses essential to the establishment, or refutation, of the factual bases of his claim may be unavailable because of death, illness or loss of memory. No one's recollection will then be as reliable as it now is, and many will have forgotten all they once knew about it. If there is now no transcript of the 1966 North Carolina trial proceedings, it is quite likely that one could not be produced ten or fifteen years hence, for reporters die and retire, or lose or destroy their notes of old proceedings. If a retrial of Williams were found to be necessary some ten to fifteen years from now, it is not unlikely that North Carolina would then find reprosecution impossible because of the unavailability of witnesses or their faded memories. Nor, if his constitutional claim is provable, should Williams be required to wait until he begins service of the invalid sentence to commence his judicial attack upon it. With all of the new and magnified problems caused by long delay in hearing his claims, he could languish in prison for years before the invalidity of his detention was established.
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> Word, on the other hand has only five months to serve in North Carolina. With time off for good behavior, the sentence will expire in approximately four months. If he must wait until he begins service of that sentence to commence a proceeding attacking it, he will have served a substantial part of it before he could reasonably hope to obtain a hearing in the state trial court. If the state trial court did not grant a prompt hearing, or if, after a hearing it denied relief, Word could not possibly complete exhaustion of his state remedies before seeking federal habeas corpus. Unless he has some remedy now, he probably will never have access to a federal court and he will serve all or a substantial part of his sentence before he can expect initial state consideration of its validity.

406 F.2d at 354.

It may easily be seen that these problems would exist were the petitioners forced to wait until service of their North Carolina convictions commenced, but now they may certainly attack these convictions under the *Peyton v. Rowe* holding.

9. Prior to *Peyton v. Rowe,* 391 U.S. 54 (1968), Williams had been refused relief by the Supreme Court of North Carolina on the grounds that the detainer was not a restraint upon his liberty so that his petition could not be heard until he was returned to North Carolina. The *Word* court reasoned that because North Carolina now would reappraise its decision in light of *Peyton v. Rowe,* Williams should again pursue remedy under the North Carolina Post-Conviction Relief Act.

district court of the custodian state as "infrequently preferable."[10] This note will examine the propriety of the decision in *Word* in light of its apparent contravention of the *Ahrens* rule.

Federal jurisdiction over habeas corpus petitions of state prisoners was granted initially in the Act of February 5, 1867.[11] Preceding the enactment of this legislation several American cases had held that the writ of habeas corpus could be obtained only by prisoners within the territorial jurisdiction of the district court in which the writ was sought. Language in *Ex parte Graham*[12] is illustrative of the rationale of these early cases:

> This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden. Were it otherwise, and the court of one district, could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the district, there would result a clashing of jurisdiction between those courts which could not easily be adjusted; and an oppression upon suitors, too intolerable to be endured.[13]

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10. 406 F.2d at 355.

11. Ch. 28, § 1, 14 Stat. 385 (1867). The privilege of habeas corpus was first guaranteed to citizens of the United States in art. I, § 9 of the Constitution which provides that: "[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Congress later gave the federal courts power to grant the writ in the Judiciary Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81 (1789). Authority was initially limited to ". . . prisoners in gaol . . . where they are in custody under or by colour of the authority of the United States. . . ." In 1867, the federal writ was extended to its present limits.

12. 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818).

13. *Id.* at 912. *See also In re* Bickley, 3 F. Cas. 332 (No. 1,387) (D.C.S.D.N.Y. 1865). The *Bickley* court concurred with the expression of sentiment made by the *Graham* court. Most adamant against extra-territorial issue of process, the *Bickley* court felt that:

> The leading feature in the constitution of circuit and district courts . . . is that each court is strictly limited in its capacity and field of action. . . . Border courts in adjoining states, endowed with exactly like functions by statute, cannot interchange or exercise that common authority conferred independently upon each, across the separating line, without an enactment of positive law enabling either to act outside its special lines of demarcation, any more than if the sister states were foreign nationalities to each other. The federal courts established in Vermont have . . . no authority to enforce any description of legal process . . . within the state jurisdiction of New Hampshire, unless a right to exercise such authority be specially conceded by public assent, and grant of the state to which such process is directed, or from particular appointment by act of congress.

3 F. Cas. at 332.

In this case, the New York court denied habeas corpus relief to a petitioner, who was imprisoned in Massachusetts at the time of his petition, on the grounds of lack of jurisdiction. *But cf.* United States v. Davis, 25 F. Cas. 775 (No. 14,927) (C.C.D.C. 1839). Here the legal custodian of certain slaves was required to produce them to the court even though said slaves were removed beyond the district *before* service of the writ. Distinguishing circumstances existed here, in that the court suspected that the custodian was attempting to evade service of the writ.

Still another expression of jurisdictional limitation was made by Chief Justice Chase in rejecting an application for the Great Writ from a prisoner on the ground that he was incarcerated outside his district. Although this case was unreported, reference to it can be found in Carbo v. United States, 364 U.S. 611, 616–17 (1961). *See also* Ahrens v. Clark, 335 U.S. 188, 205 n.21 (1948) (dissent of Justice Rutledge); CONG. GLOBE, 39th Cong., 2d Sess. 790 (1867).

On January 29, 1867, the Senate took under consideration H.R. 605, a bill to amend the existing Judiciary Act. The bill's underlying purpose was to enforce the constitutional rights of slaves freed by the thirteenth amendment and the freedom of families of United States soldiers, especially those of freed slaves.[14] As hearings on the bill proceeded, Senator Johnson, reflecting the view adopted by earlier case law, objected to a system of writ-issuing district courts with unlimited jurisdiction on the ground that such a system could be "exceedingly inconvenient, embarrassing, and expensive,"[15] and that therefore the writ-issuing authority should be ". . . limited to the circuit judge of the circuit where the party is imprisoned or at least to the district judges within the same circuit."[16]

In response to these objections Senator Trumbull, although disagreeing that the bill was susceptible of that construction, agreed to cure the alleged defect by inserting the words "within their respective jurisdictions."[17] The bill was then passed by the Senate as amended, and later passed by the House.[18] In retrospect, it would seem that neither Senator could have been cognizant of the import of their debate,[19] yet it was essentially upon this dialogue that Justice Douglas, speaking for the majority, rested his interpretation of the statute in *Ahrens*.[20]

The *Ahrens* petitioners were some one hundred and twenty Germans who were being held at Ellis Island, New York,[21] for deportation to Germany. Their deportation had been directed under removal orders issued by the Attorney General of the United States. Seeking to challenge their deportations on several grounds by means of habeas corpus, the Germans made application to the District Court for the

14. Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 634 (1949), *citing*, CONG. GLOBE, 39th Cong., 1st Sess. 87 (1866).

15. CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867).

16. *Id.*

17. *Id.* at 790.

18. It might be amusing to note the dialogue that took place in the House of Representatives upon its consideration, on January 31, 1867, of the amendment to the Judiciary Act that inserted the fateful words, "within their respective jurisdictions." The situation on the floor of Congress went as follows:

> (Mr. Cook) I move the House concur in the amendment.
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> (Mr. Wright) I would ask whether anyone in the House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter]
>
> (The Speaker) The gentleman from New Jersey is not in order. The question is on the motion to concur.
>
> The motion was agreed to.

Id. at 899.

19. In regard to the significance of this narrative between Johnson and Trumbull, and their subsequent amendment of the Bill involved, *see generally* Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 639 (1949). That legal scholar felt that "Congress had set out to make the writ of habeas corpus available in one more situation — not to legislate about the territorial reach of the courts or the judges. . . . [Senator Johnson] . . . was concerned . . . for efficient administration." The scholar concluded this particular criticism by stating that he felt it was "[r]eally surprising that the Court in *Ahrens v. Clark* considered itself bound by the words of two Senators who were trying so hard to avoid interfering with the view of the judiciary or with the convenience of judicial administration." *Id.*

20. *See* 335 U.S. at 192-93.

21. Ellis Island, New York, is within the jurisdiction of the Federal District Court for the Southern District of New York.

District of Columbia. Respondent moved to dismiss on the grounds that the petitioners were not confined in the District of Columbia. The motion was granted by the district court and this ruling was affirmed by the court of appeals. The Supreme Court affirmed the denial of relief.

The problem of statutory interpretation thus facing the Court in *Ahrens* was whether the words "within their respective jurisdictions" limited the district courts to consideration of only those petitions filed by petitioners confined within the territorial jurisdiction of the court. The majority, after finding support for its position in several lower federal court cases,[22] rested its decision that jurisdiction is so limited primarily upon the legislative history[23] of the statute and the fact that the administration of a contrary rule would involve difficulties including the ". . . opportunities for escape afforded by travel, the cost of transportation, [and] the administrative burden of such an undertaking. . . ."[24]

In his dissent, Justice Rutledge observed that "[f]or the first time this Court puts a narrow and rigid territorial limitation upon issuance of the writ by the inferior federal courts. Heretofore such constrictive formulations have been avoided generally, even assiduously, out of regard for the writ's great office in the vindiction of personal liberty."[25] He then proceeded to controvert each of the majority's

22. United States *ex rel.* Harrington v. Schlotfeldt, 136 F.2d 935 (7th Cir. 1943), *cert. denied,* 327 U.S. 781 (1946); Jones v. Biddle, 131 F.2d 853 (8th Cir. 1942), *cert. denied,* 318 U.S. 784 (1943); United States v. Day, 50 F.2d 816 (3d Cir. 1931); *Ex parte* Gouyet, 175 F. 230 (D. Mont. 1909); *In re* Bickley, 3 F. Cas. 332 (No. 1,387) (D.C.S.D.N.Y. 1865); McGowan v. Moody, 22 App. D.C. 148 (1903); *cf. Ex parte* Graham, 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818) (Petitioner, confined in Pennsylvania, asking relief from Rhode Island conviction in Pennsylvania, denied relief). *But cf. Ex parte* Kenyon, 14 F. Cas. 353 (No. 7,720) (C.C.W.D. Ark. 1878) (The Arkansas court here held that its writ of habeas corpus properly ran into the jurisdiction of the circuit court for Coo-wees-coowee district, Cherokee nation, under whose authority and within whose jurisdiction petitioner was confined). *But see* Sanders v. Allen, 100 F.2d 717 (D.C. Cir. 1938), where the D.C. Circuit Court allowed jurisdiction in a habeas corpus proceeding by the District Court for D.C. over D.C. prisoners committed to the District Workhouse in Occoquan, Virginia. This case, it might be noted, was later overruled by McAffee v. Clemmer, 171 F.2d 131 (D.C. Cir. 1948), *cert. denied,* 337 U.S. 932 (1949) (decided after and following the decision in *Ahrens*).

23. The legislative history so compelling the court to rule as it did primarily involved the repartee between Senator Johnson and Senator Trumbull and their subsequent amendment inserting the words "within their respective jurisdictions" into the Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867). *See* note 11 *supra* and accompanying text.

One authority has criticized the *Ahrens* Court's interpretation of the statute and the legislative history preceding it, stating:

> When . . . the [Ahrens] Court construed the statute, it sought with complete docility to follow the intent of Congress, and . . . gave the law a rigidity Congress never intended. Not a word was said about the cardinal principle of seeking a construction that avoids constitutional doubts: apparently no constitutional dangers were foreseen. . . . The existing law, prudently applied, could . . . carry the writ wherever it ought to go around the world.

Fairman, *Some New Problems of the Constitution Following the Flag,* 1 STAN. L. REV. 587, 641 (1949).

24. 335 U.S. 188, 191 (1948).

25. *Id.* at 194 (dissent of Rutledge, J.). *See also* Comment, *GI's Overseas and Habeas Corpus,* 1 STAN. L. REV. 555, 556 (1949). Although the *Ahrens* Court paid little cognizance to the fact, there was a greatly expanding use of the federal writ of habeas corpus at the time *Ahrens* was handed down. *See generally* Note, *The*

supporting arguments. As to the policy considerations, Justice Rutledge noted that the administrative burden of transporting prisoners, if district courts were permitted to issue the writ for petitioners detained outside of the district, would be substantially reduced by the fact that the district court in its discretion could decline to exercise jurisdiction where the jailer could prove the existence of a more convenient forum.[26]

Moreover, he could find no indication in the short statement by Senator Johnson[27] of an intent to limit habeas corpus petitions to the locus of the prisoner, but rather contended that the bill's broad wording was directed to the "possibility that [it] would confer power upon district judges to issue process against *jailers* in remote districts, and thus create departure from the usual rule, in *habeas corpus* cases as in others, that process does not run beyond the territorial jurisdiction of the issuing court."[28] Authority for this interpretation was found in several federal court decisions,[29] and in dictum in *Ex parte Endo*.[30] Indeed, the decision in *Endo* would seem to require a contrary holding in *Ahrens*. In *Endo,* a Japanese-American confined in a wartime relocation center applied for habeas corpus relief in the district in which she was confined. After her petition was denied and while her appeal to the circuit court was pending, she was moved to another relocation center in a different district. The Court, though reserving judgment on the question presented in *Ahrens,* held that the district court did not lose jurisdiction over the petitioner though she was removed from the district: ". . . we are of the view that the court may act if there is

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Freedom Writ — The Expanding Use of Federal Habeas Corpus, 61 HARV. L. REV. 657 (1948).

One writer, viewing the early history of the Anglo-Saxons, felt that the *Ahrens* ruling was not in harmony with the historic purposes of the writ. Pointing to the old English practice of concealing prisoners so as to preclude them from the full benefits of the law, the critic felt that the creators of the writ must have contemplated its application to situations where there was an unknown place of confinement, so that if the custodian could somehow be located, he could be required to produce the body. 3 MIAMI L.Q. 52, 53 (1948).

Furthermore, early cases include dicta to the effect that if a statute is subject to alternative constructions, one permitting the granting of the writ and the other not, the construction upholding the issuance of the writ should be adopted. Whitney v. Dick, 202 U.S. 132, 136 (1906).

26. 335 U.S. at 207; *see* 16 U. CHI. L. REV. 335, 336 (1949).

27. *See* note 15 *supra* and accompanying text.

28. Ahrens v. Clark, 335 U.S. 188, 204 (1948) (emphasis added).

29. *E.g.,* Sanders v. Allen, 100 F.2d 717 (D.C. Cir. 1938); United States v. Davis, 25 F. Cas. 775 (No. 14,926) (C.C.D.C. 1839).

30. *Ex parte* Mitsuye Endo, 323 U.S. 283, 306 (1944). This dictum in *Endo* was predicated in part on the statement of Judge Cooley in *In re* Jackson, 15 Mich. 416, 439 (1867):

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent. . . . The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it. The important question is, where is the power of control exercised?

In re Jackson, 15 Mich. 416, 439 (1867).

a respondent within reach of its process who has custody of the petitioner."[31] If it is the presence of the custodian which is requisite to jurisdiction, as asserted in *Endo,* then arguably the *Ahrens* Court should have reached an opposite conclusion.[32]

Despite these seeming inconsistencies, the *Ahrens* mandate, requiring petitioner's confinement in the district in which application for relief is sought, has yet to be expressly overruled and has been applied by the federal district[33] and circuit[34] courts to a variety of factual situations.[35] There have been several cases involving detainers, with factual circumstances most similar to those in *Word,* in which the decision reached was based upon the *Ahrens* mandate. Illustrative is *Booker v. Arkansas.*[36] Petitioner there was convicted in an Arkansas state court on a state charge of larceny and was sentenced to seven years in the Arkansas penitentiary. After serving one-third of his sentence, he was placed on parole. While on parole, petitioner was convicted by a federal court of committing a federal crime and was sentenced to ten years imprisonment in the United States penitentiary at Atlanta, Georgia — a sentence petitioner was still serving at the time of his application for relief. Arkansas lodged a detainer against Booker with the federal prison in Georgia. Thus, as a consequence of the detainer, Booker was to be returned to Arkansas upon his release from Atlanta. Booker made application for relief from the Arkansas conviction with the United States District Court for the Eastern District of Arkansas.[37] Treating Booker's request as one of the species of habeas corpus, the court denied him relief, reasoning that he was not confined within its territorial jurisdiction. The court added that federal habeas jurisdiction, if it existed at all, lay with the United States District Court for the Northern District of Georgia, where petitioner was confined.[38]

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31. 323 U.S. at 306.

32. *See* 16 U. CHI. L. REV. 335, 337 (1949).

33. *E.g.,* Sutor v. United States, 226 F. Supp. 552 (W.D. Pa. 1964) (Prisoner confined in Georgia denied relief by Pennsylvania court); *In re* Van Collins, 160 F. Supp. 165 (D. Me. 1958) (Prisoner confined in Pennsylvania denied relief by Maine court); United States *ex rel.* Dorsch v. Hunter, 101 F. Supp. 751 (W.D. Pa. 1951) (Prisoner confined in Kansas denied relief by Pennsylvania court).

34. *E.g.,* United States *ex rel.* Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969); Allen v. United States, 327 F.2d 58 (5th Cir. 1964); Karp v. United States, 296 F.2d 564 (8th Cir. 1961), *cert. denied,* 368 U.S. 867 (1962); Hibdon v. Warden, 245 F.2d 816 (6th Cir. 1957).

35. *See, e.g.,* Halprin v. United States, 293 F. Supp. 1186 (S.D.N.Y. 1968) (Relief denied by court following *Ahrens* when both petitioner and respondent were absent from the district in which relief was sought); Duncan v. State of Maine, 295 F.2d 528 (1st Cir. 1961), *cert. denied,* 368 U.S. 998 (1962) (Prisoner, sentenced in Maine, was confined in California only by reason of a prison contract between Maine and the federal government. His request for habeas corpus relief from the Maine court was denied on the grounds of lack of jurisdiction, following *Ahrens*); Powell v. Langlois, 204 F. Supp. 91 (E.D.N.C. 1962) (Escaped prisoner filed application with former confining state while awaiting extradition in sanctuary state. Petitioner was dismissed on grounds that petitioner was outside of court's jurisdiction as per *Ahrens*).

36. 380 F.2d 240 (8th Cir. 1967).

37. *But see* Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969). According to the line of reasoning of the *Word* court, applying to the district of sentencing is the proper procedure.

38. Booker v. Arkansas, 380 F.2d 240, 243 (8th Cir. 1967). *Accord,* United States *ex rel.* Van Scoten v. Pennsylvania, 404 F.2d 767 (3d Cir. 1968) (*citing Ahrens*); Hart v. Bureau of Probation and Parole, 290 F.2d 550 (6th Cir. 1961)

The *Word* court rested its holding that "federal habeas corpus provides a present remedy for a state prisoner seeking to attack, on constitutional grounds, a conviction in another state which underlies a detainer filed with his keeper" and "that the action is properly brought in a district court in the demanding state"[39] upon what it felt to be subsequent erosions of the *Ahrens* mandate.[40] This conclusion is assailable for arguably, as Judge Winter notes in dissent, all of the authorities relied upon by the majority involve explicit exceptions to *Ahrens* rather than modifications.

Word first cites *Hirota v. MacArthur*[41] as supporting its conclusion that the vitality of the *Ahrens* rule has been eroded. The *Hirota* petitioners were post-World War II Japanese prisoners of war convicted of war crimes by the International Military Tribunal for the Far East and were confined in Asia at the time of their habeas corpus petition to the Supreme Court. The Court denied relief, per curiam, on the ground that the sentencing tribunal, because it was established by the allied powers, was not subject to the authority of courts of the United States. In an extensive concurring opinion,[42] however, Justice Douglas considered the jurisdictional question, and rejected the Government's contention that *Ahrens* limited *all* habeas corpus inquiries to those of petitioners confined within the jurisdiction of the petitioned court. *Ahrens* expressly reserved determination of the question of what process is available to petitioners confined in an area not subject to the jurisdiction of any district court.[43] Rather, the thrust of the jurisdictional allocation recognized in *Ahrens* was directed to ". . . a problem of judicial administration, not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ."[44] Taken in this context then, *Hirota* represents not a contravention of *Ahrens* but merely the filling of a void expressly created by that decision.[45]

(*citing Ahrens*). *See also* Phillips v. Hiatt, 83 F. Supp. 935 (D. Del. 1949). In this case, petitioner who was serving a prison term in the United States penitentiary at Atlanta pursuant to a sentence imposed by the United States District Court for the Eastern District of Pennsylvania, alleged that a new charge was pending against him in the District of Delaware and that the warden at Atlanta had been served with a detainer filed by the United States Attorney for Delaware. Contending that he was being deprived of a just and speedy trial as guaranteed by the sixth amendment to the Constitution, petitioner made application for a writ of habeas corpus to issue from the District Court of Delaware, directing the warden of the Atlanta prison to produce the petitioner in the Delaware court to stand trial on his pending Delaware charge. Because petitioner was not confined in its jurisdiction, *citing Ahrens,* the court denied the application.

39. Word v. North Carolina, 406 F.2d 352, 353 (4th Cir. 1969).

40. The court stated that "[S]ubsequent cases have made it plain that physical presence of the prisoner within the district is not an invariable prerequisite." *Id.* at 358.

41. 338 U.S. 197 (1948). For an interesting discussion of this case, *see* Fairman, *Some New Problems of the Constitution Following the Flag,* 1 STAN. L. REV. 587, 589–603 (1949).

42. Hirota v. MacArthur, 338 U.S. 197, 199–215 (1948).

43. Ahrens v. Clark, 335 U.S. 188, 192 n.4 (1948).

44. Hirota v. MacArthur, 338 U.S. 197, 202 (1948).

45. *See generaly* Burns v. Wilson, 346 U.S. 844, 851–52 (1953) (separate opinion), in which Justice Frankfurter argued that the Court had wrongfully neglected to face the issue posed by the *Ahrens* void.

Carbo v. United States[46] is cited by *Word* as another alleged erosion of *Ahrens*. Carbo was confined in a New York prison pursuant to a state misdemeanor conviction. While he was so confined, the United States District Court for the Southern District of California issued a writ of *habeas corpus ad prosequendum*[47] directed to the jailer of the New York prison where Carbo was confined, commanding him to produce the prisoner for his trial on a federal charge in the California court. Relying on the *Ahrens* mandate requiring presence of the prisoner in the district before the writ will issue, Carbo attempted to quash this writ, contending the California district court had no jurisdiction to issue the writ in question. The Supreme Court found Carbo's reliance on *Ahrens* to be misplaced and denied the motion holding that the territorial limitation in 28 U.S.C. section 2241(a), providing that the writ of habeas corpus be granted only by district courts "within their respective jurisdictions" and the *Ahrens* court's interpretation of that statute did not apply to the writ of *habeas corpus ad prosequendum.*[48] The distinction was based primarily upon the different judicial functions of the two species of habeas corpus. It was felt that *habeas corpus ad prosequendum,* because it is used for the purpose of bringing prisoners to trial, was "necessary as a tool for jurisdictional potency as well as administrative efficiency"[49] and thus should properly extend to the entire country.

Similarly, *Word* found further erosion of the *Ahrens* mandate in *Jones v. Cunningham,*[50] but arguably, *Jones,* like *Hirota* and *Carbo,*

46. 364 U.S. 611 (1961).

47. The writ of *habeas corpus ad prosequendum* is a writ used to remove a prisoner for prosecution to the proper court to be prosecuted.

At common law there were several varieties of the writ of habeas corpus, many of which are still used by American courts. *See* 3 W. BLACKSTONE, COMMENTARIES 129–32 (1768), where several of the English common law writs are described as follows:

Habeas corpus ad subjiciendum — a writ directed to the person detaining another, and commanding him to produce the body of the prisoner (or person detained), with the day and cause of his caption and detention. [Also known as the Great Writ.]

Habeas corpus ad respondendum — used to remove a prisoner confined by process of an inferior court so that he might be charged in a higher court.

Habeas corpus ad satisfaciendum — used to bring a prisoner to a higher court so that execution of a judgment might be levied against him.

Habeas corpus ad prosequendum, testificandum, and deliverandum — issued out of any Courts of Westminster Hall, to remove a defendant from the inferior court to the superior court. [Also known as *habeas corpus cum causa.*]

48. The *Carbo* court felt that this writ was "necessary as a tool for jurisdictional potency, as well as administrative efficiency, extended to the entire country." 364 U.S. at 618. *Accord,* McDonald v. United States, 403 F.2d 37 (2d Cir. 1968); Terlikowski v. United States, 379 F.2d 501 (8th Cir. 1967). The law is still somewhat in a state of flux as to the territorial requirements for the other varieties of the writ of habeas corpus, including the writ of *habeas corpus ad testificandum. Compare* Silver v. Dunbar, 264 F. Supp. 177 (S.D. Cal. 1967) (where the court held that the power to issue a writ of *habeas corpus ad testificandum* does not run outside of the jurisdiction of a federal district court) *with* Duncan v. Maine, 195 F. Supp. 199, 201 (S.D. Me. 1961) (where the court stated that it would have jurisdiction to issue the writ extra-territorially in a proper case) (dictum). *Cf.* Bandy v. United States, 408 F.2d 523, 524 (8th Cir. 1969). Petitioner here, present in court pursuant to a writ of *habeas corpus ad prosequendum,* made application to that same court for a writ of *habeas corpus ad subjiciendum* and was denied relief on grounds of the *Ahrens* mandate.

49. Carbo v. United States, 364 U.S. 611, 618 (1961).

50. 371 U.S. 236 (1963).

involved a specific exception to *Ahrens*. In *Jones*, a habeas corpus proceeding was commenced in Virginia by a prisoner confined in that state. Subsequently, petitioner was paroled to the custody of a Georgia parole officer and became a Georgia resident. The Court held that the Virginia court's jurisdiction over the petitioner's habeas corpus proceeding was not lost by reason of the petitioner's move to Georgia, basing its decision on the exception to the *Arhens* rule reserved in *Ex parte Endo*,[51] that subsequent removal of the petitioner from the territorial district does not deprive the district court of jurisdiction.

Finally, *Word* relied upon the enactment of two federal statutes as evidence of the declining vitality of the *Ahrens* mandate. 28 U.S.C. section 2255, enacted in 1948, requires federal prisoners to seek post-conviction relief in the district in which is located the court that imposed sentence.[52] This particular statute partially grew out of a problem existing in districts containing large federal penal institutions.[53] Because of the habeas corpus jurisdictional rule espoused in *Ahrens*, those districts were receiving an inordinate number of habeas corpus applications from federal prisoners.[54] Recognizing these problems, the Judicial Conference[55] recommended that legislation be enacted to ease this situation and Congress, in passing section 2255, accepted their recommendations. Granted that policy considerations merited the passage of Section 2255, it was, nevertheless, legislation enacted to affect the post-conviction relief remedies available to federal prisoners, not those available to state prisoners. The section 2255 remedy was not intended to displace the habeas corpus remedy available to state prisoners. The Supreme Court carefully distinguished between the two remedies in *United States v. Hayman*.[56] In *Hayman*, a federal prisoner confined in Washington made a section 2255 application for relief from his sentence to the California court that sentenced him. The federal court in California denied relief, partially because it felt that it lacked jurisdiction over the prisoner under the *Ahrens* mandate. On appeal, finding jurisdiction in the California court, the Supreme Court reversed the lower court's decision. Concluding that *Ahrens* was inapplicable, the Court stated:

51. 323 U.S. 283 (1944); *see* notes 24–26 *supra* and accompanying text. *See also* Holland v. Ciccone, 386 F.2d 825 (8th Cir. 1967); United States *ex rel.* Circella v. Neely, 115 F. Supp. 615 (N.D. Ill. 1953), *aff'd* 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); *cf.* Truesdell v. United States, 400 F.2d 859 (8th Cir. 1968) (Appellant's claim that the district lost jurisdiction over him because he had been surrendered to Iowa authorities in obedience to a writ of *habeas corpus ad prosequendum* was rejected).

52. *See* R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS § 29.2–3 (1st ed. 1965); 9 NATURAL RESOURCES J. 85, 87 n.15 (1969); 100 U. PA. L. REV. 1054 (1952).

53. *E.g.*, District of Kansas (Leavenworth Federal Penitentiary); Northern District of Georgia (Atlanta Federal Penitentiary); Middle District of Pennsylvania (Lewisburg Federal Penitentiary).

54. *See* Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337, 350 (1949); Note, *Federal Habeas Corpus — The Search for a Solution to the Prematurity Concept*, 1 VALPARAISO L. REV. 155, 163 n.70 (1966).

55. Comprised of the Chief Judge of each judicial circuit, the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals and a district judge from each judicial circuit; the Judicial Conference makes comprehensive surveys of judicial administration and submits its proposals to Congress. 28 U.S.C. § 331 (1964).

56. 342 U.S. 205 (1952).

> The court below . . . held that the sentencing court could not hold the required hearing because it was without power to order the presence of a prisoner confined in another district. This want of power was thought to follow from our decision in *Ahrens*. . . . This is *not* a habeas corpus proceeding. The sentencing court . . . would not be issuing an original writ of habeas corpus to secure respondent's presence. Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section.[57]

Thus concluding that section 2255 is a congressionally created remedy available to federal prisoners, it is difficult to ascertain how its creation might weaken any application of the *Ahrens* mandate to the factual situation that arose in *Word*.

The *Word* court also alluded[58] to the enactment of 28 U.S.C. section 2241(d)[59] as further evidence of a general decline in the vitality of *Ahrens*. This asserted modification of the *Ahrens* doctrine permits a prisoner confined in a state correctional institution in a state containing more than one federal judicial district to apply to the court in the district in which he was convicted and sentenced, if that court is in the same state as the district of confinement. There were basically two reasons for this new legislation.[60] First, the federal districts containing major state prisons were disproportionately burdened with habeas corpus applications under the strict *Ahrens* rule. Second, records and witnesses are more conveniently available in the district in which the sentencing court is located. Despite its application to a habeas corpus proceeding of an intra-state nature,[61] the statute nevertheless has no application to the *Word* factual situation in which the district of confinement and district of sentencing are in different states.

However, despite its apparently strained reliance on subsequent interpretations of *Ahrens*, a tenable argument may be made in support of the *Word* court's decision if the cases discussed above are viewed collectively. If *Ahrens* is taken to stand for the broad proposition that it is the location of the *petitioner* that is determinative of the jurisdictional question, then the subsequent cases and legislation must stand

57. *Id.* at 220 (emphasis added).

58. *See* Word v. North Carolina, 406 F.2d 352, 360 n.10 (1969).

59. The statute states:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2241(d) (Supp. II 1965–66).

60. *See* United States *ex rel.* Griffin v. LaVallee, 270 F. Supp. 531, 533 (E.D.N.Y. 1967). As to the legislative history behind the enactment of section 2241(d), *see* 2 U.S. CODE CONG. & AD. NEWS 2968–78, 89th Cong., 2d Sess. (1966).

61. *See, e.g.*, United States *ex rel.* Walton v. Russell, 297 F. Supp. 197 (W.D. Pa. 1969); Laue v. Nelson, 279 F. Supp. 265 (N.D. Cal. 1968). Before the enactment of section 2241(d), the courts applied the *Ahrens* mandate. *See, e.g.*, Webb v. Beto, 262 F.2d 105 (5th Cir.), *cert. denied*, 385 U.S. 940 (1966).

for the proposition that the location of the *respondent* is determinative where departure from the *Ahrens* rule is compelled by considerations of efficient judicial administration. Such compulsion exists in the factual situation presented in *Word.* Because the petitioners in *Word* were challenging the validity of a sentence to be served following their release from confinement in Virginia, the jurisdictional problem faced by the court was precipitated by the Supreme Court's recent decision in *Peyton v. Rowe,*[62] which held that the "in custody" requirement of the federal habeas corpus statute does not preclude challenging the second of two consecutive sentences.[63] The petitioners in *Peyton,* however, unlike those in *Word,* were imprisoned under sentences imposed by the same sovereign. Since the court in *Ahrens* could hardly have anticipated the jurisdictional problems raised by *Peyton's* expansion of the Great Writ, the rule announced in *Word* may be taken as merely a rule designed to afford efficient judicial administration in *Peyton* situations involving multi-state convictions.

The majority in *Word* cites several compelling arguments in favor of its conclusion that its decision is compelled by considerations of efficient judicial administration. The record of the state trial will be readily available in the sentencing state.[64] If an evidentiary hearing is required, the state trial judge, prosecuting and defense attorneys, and witnesses will usually be available in the sentencing state.[65] And, although the custodian in the confining state holds the prisoner for the sentencing state, he is under no duty to defend the foreign conviction. Furthermore, the attorney general of the sentencing state, the proper party to defend the foreign conviction, is not suable in his official capacity or subject to process in the confining state.

Although several policy arguments can be made which militate against the rule announced in *Word,* in sum they appear less persuasive.[66] The *Word* majority admitted that under its rule pretrial conferences between prisoner and counsel may be a practical impossibility. Other arguments were noted in *Ahrens*: the opportunities to escape afforded by travel,[67] the costs of transportation[68] and the added administrative burden.[69]

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62. 391 U.S. 54 (1968).
63. *See* note 8 *supra.*
64. *Cf.* Kaufman v. United States, 394 U.S. 217, 222 n.5 (1969).
65. *See* United States v. Hayman, 342 U.S. 205, 220–21 (1952).
66. *See* George v. Nelson, 410 F.2d 1179, 1182 (9th Cir. 1964).
67. In regard to this danger of escape, one might note that the employment of the writ of *habeas corpus ad testificandum,* used in the nature of a subpoena to bring prisoners as witnesses from one jurisdiction to a court located in another anywhere in the United States, is unquestioned by the courts. *E.g.,* United States v. Quinn, 69 F. Supp. 488 (N.D. Ill. 1946).
68. In an extreme case involving German prisoners of war confined in China, who were applying to the Federal District Court for the District of Columbia, an unbelievable amount of expense would have been borne had the writ been granted. Johnson v. Eisentrager, 339 U.S. 763 (1950). The *Johnson* Court reasoned:

> To grant the writ to these prisoners might mean that our army must transport them across the seas for a hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.

Id. at 778–79.
69. *But see* R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 88 (2d ed. 1969).

It is submitted, however, that although there are considerations which justify a departure from the *Ahrens* rule, the *Word* court's characterization of the district court of the confiing state as the "infrequently preferable" court in which to apply for habeas corpus relief will obtain too harsh a result. As Judge Sobeloff noted in his dissent in *Word,* relegating the district court of the confining state to secondary status constricts the use of the habeas corpus remedy in view of the present adverse effects of the detainers, such as increased custody levels and ineligibility of the petitioners for trustee status or parole. A prisoner should hardly be denied access to the district court of the confining state where the confining state relies on a foreign conviction to justify imposition of increased restraints. The majority's attempt to justify its holding on the ground that the primary purpose of the petition is to avoid service of the North Carolina sentences seems to derive from a narrow, "technical and highly unrealistic" construction of the petitions. "If anything, the immediate consequences of the detainer would seem to bear down upon them more oppressively than the North Carolina sentence to be served in the future."[70]

The *Word* decision then should be understood to make the district court of the sentencing state available to prisoners seeking habeas corpus relief, but not to preclude the jurisdiction of the district court of the confining state.[71] At least one recent case has followed this interpretation of *Word.* In *George v. Nelson,*[72] petitioner was confined in California and also had a detainer placed against him by the State of North Carolina where he was to serve a sentence upon the completion of his California term. He made application for the writ to the court in the California district in which he was confined, naming the warden of the California prison as respondent. Petitioner asserted in his application that: ". . . [h]e wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer,[73] adversely affects favorable consideration of parole and reduced custodial classification by California authorities."[74] In a decision in accord with *Ahrens,* the ninth circuit held that the

70. 406 F.2d 352, 365 (1969).
71. *See* 44 N.Y.U.L. REV. 845, 853 (1969).
72. 410 F.2d 1179 (9th Cir.), *cert. granted,* 90 S. Ct. 433 (1969).
73. "Many detainers are apparently filed for punitive reasons; they are withdrawn shortly before the convict's release, having served their purpose by curtailing prison privileges and preventing parole." Comment, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions,* 77 YALE L.J. 767, 773 (1968). As to other adverse effects of detainers, *see* Pitts v. State, 395 F.2d 182 (4th Cir. 1968) (opinion written by Circuit Judge Sobeloff). In a strongly-worded opinion, the fourth circuit states:

> Detainers, informal aids in interstate and intrastate criminal administration, often produce serious adverse side-effects. The very informality is one source of the difficulty. Requests to an imprisoning jurisdiction to detain a person upon his release so that another jurisdiction may prosecute or incarcerate him may be filed groundlessly, or even in bad faith . . . . The accusation in a detainer need not be proved; no judicial office is involved in issuing a detainer. As often happens, the result of the then unestablished charge upon which the detainer in this case rested was that the detainee was seriously hampered in his quest for parole or commutation. . . . In addition to restricting parole and commutation eligibility, detainers often bar prisoners from privileges, such as serving as prison trustees. Most importantly, perhaps, detainers may seriously handicap rehabilitative efforts.

Id. at 187–88.
74. 410 F.2d at 1180.

District Court for the Northern District of California had jurisdiction to entertain the application as petitioner was in custody in that district. The California warden, who had been named as the respondent, had argued that he was not the proper party insofar as petitioner was challenging the North Carolina conviction. The court answered this contention, stating that:

> [w]hile the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense.[75]
>
> In [so] holding . . . we have not overlooked the fact that the Fourth Circuit in Word v. North Carolina . . . has reached a contrary result. The *Word* court . . . did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction.[76]

Because strict adherence to the *Ahrens* rule in cases involving habeas corpus challenges to future multi-district sentences would result in a constriction of the availability of the Great Writ, the result obtained in *Word* seems to justify departure from that rule. As an alternative, however, it is submitted that the present federal habeas corpus statute be amended in the form of a forum non conveniens statute.[77] Such an amendment would permit the discretionary transfer of habeas corpus proceedings to district courts of the sentencing state if it appears that such action is warranted by efficient judicial administration.

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75. *Id.* at 1181. The court later went on in its opinion to give cognizance to the contrary holding in *Word*, although it reversed the question as to the actual propriety of the *Word* court's decision. The ninth circuit faced only the question of the petitioner making application to his district of confinement, not whether or not the petitioner might seek relief in the district of sentencing.

The ninth circuit had previously faced a similar situation in Ashley v. Washington, 394 F.2d 125 (9th Cir. 1968). Following the *Ahrens* mandate, the court there held that a prisoner, confined in Florida pursuant to a Florida conviction, faced with a detainer filed by the State of Washington, could *not* challenge the Washington conviction upon which the detainer was based, in a habeas corpus proceeding brought in Washington. The *Ashley* court implied that the Florida court was the proper court from which the petitioner should seek relief, reasoning:

> [S]o far as we can tell, the detainer . . . does not purport to have any extra-territorial effect, assuming that somehow it could. If it has any effect in Florida, that is only because Florida chooses to give it that effect. If that effect deprives Ashley of any constitutional right, the federal court in which Ashley should proceed is that of the appropriate district in Florida.

Id. at 126.

76. 410 F.2d at 1181.

77. *Cf.* 28 U.S.C. § 1404(a) (1964):

> For the convenience of parties and witnesses, in the interest of justice, a district court or division may transfer any civil action to any other district or division where it might have been brought.

Such an amended section 2241(a) might read:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. For the convenience of parties and witnesses and in the interest of justice, the district court containing the petitioner's place of confinement *may* transfer the proceeding to the district containing the petitioner's sentencing court.